

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

Amendment of Section 73.202(b),)

Table of Allotments,)

FM Broadcast Stations.)

(Auburn, Northport, Tuscaloosa, Camp Hill,)

Gardendale, Homewood, Birmingham, Dadeville,)

Orrville, Goodwater, Pine Level, Jemison, and)

Thomaston, Alabama))

MM Docket No. 01-104

RM-10103

RM-10323

RM-10324

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 2003

Released: May 20, 2003

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for reconsideration of a *Report and Order* ("R&O")¹ in this proceeding, filed jointly by Cox Radio, Inc. and its wholly-owned subsidiary CXR Holdings, Inc. ("Cox") and Radio South, Inc. ("RSI" or collectively "Joint Petitioners").² An opposition was filed on behalf of Preston W. Small ("Small"). Thereafter, the Joint Petitioners filed a motion to strike the opposition,³ as well as a substantive reply to the opposition. Small filed an opposition to the motion to strike and reply comments. After the pleading cycle ended, various other pleadings were filed.⁴

BACKGROUND

2. This proceeding began with the filing of a rulemaking petition by Auburn Network, Inc. ("ANI"), requesting the allotment of Channel 263A at Auburn, Alabama, as its second local FM service. A *Notice of Proposed Rule Making* ("NPRM") was subsequently released, proposing the Auburn allotment.

¹ Auburn, AL, et al., 17 FCC Rcd 16227 (Med. Bur. 2002).

² Public Notice of the filing of the petition for reconsideration was given on October 18, 2002, Report No. 2580.

³ In their motion to strike, the Joint Petitioners contend that Small is not an "interested person" under the Administrative Procedure Act, 5 U.S.C. § 555(b), and thus has no standing to participate in this proceeding because he would not be harmed by grant of the reconsideration petition. On the contrary, they assert that Small has an interest in another rulemaking proceeding, MM Docket No. 98-112, in which he has participated. In his opposition, Small claims that the Joint Petitioners' reconsideration petition contains *ex parte* statements, attacking Small's position in MM Docket No. 98-112, and that he has a "legitimate interest" in assuring that he is not harmed by a possible rule violation. We will deny the motion to strike and allow Small to participate because he is responding to arguments made by the Joint Petitioners about Small. Our view is further buttressed by the fact that there is a nexus between MM Docket Nos. 01-104 and 98-112: As will be discussed *infra*, resolution of the Joint Petitioners' reconsideration petition necessarily involves a discussion of the impact of the decision in MM Docket 98-112, in which Small has a pending petition for reconsideration.

⁴ On December 16, 2002, the Joint Petitioners filed a letter; and on December 19, 2002, Small filed a motion for leave to supplement the record and a reply to the Joint Letter. We will grant the motion and accept the supplement because it will facilitate resolution of this case based upon a full and complete factual record.

3. In response to the *NPRM*, three counterproposals were filed. First, RSI, the licensee of Stations WLXY(FM), Channel 263C1, Northport, Alabama, and WTUG(FM), Channel 225C1, Tuscaloosa, Alabama, proposed to reallocate and to change the communities of license of these stations pursuant to the provisions of Section 1.420(i) of the Commission's Rules.⁵ Specifically, RSI proposed the reallocation of Channel 263C1 from Northport to Helena, Alabama, as a first local service and the modification of Station WLXY(FM)'s license accordingly. To prevent the removal of the only local aural service in Northport, RSI also proposed the reallocation of Channel 225C1 from Tuscaloosa to Northport and the modification of Station WTUG's license to specify Northport as the station's community of license. This counterproposal was mutually exclusive with the *NPRM*'s proposal because Channel 263C1 at Helena was short-spaced under the minimum distance separation requirements to Channel 263A at Auburn.

4. Second, Cox proposed a mutually exclusive set of interrelated allotments in order to upgrade, reallocate, and change the community of license of its Station WODL(FM), Channel 247A, Homewood, Alabama,⁶ pursuant to the provisions of Sections 1.420(g)(3) and (i) of the Commission's Rules.⁷ Specifically, Cox proposed the substitution of Channel 247C2 for Channel 247A at Homewood, the reallocation of Channel 247C2 from Homewood to Gardendale, Alabama, as a first local service, and the modification of Cox's license for Station WODL(FM) accordingly. To accommodate the reallocation to Gardendale, Cox also proposed (1) the substitution of Channel 262A for Channel 247A at Dadeville, Alabama, and the modification of Station WZLM's license accordingly; (2) the substitution of Channel 300A for Channel 247A at Orrville, Alabama, and the modification of Station WJAM-FM's license; (3) the reallocation and change of community of license for Station WSSY-FM, Channel 248A, from Talladega to Goodwater, Alabama; (4) the modification of the reference coordinates for vacant Channel 248A, Pine Level, Alabama; (5) the reallocation and change of community of license for Station WEZZ-FM, Channel 249A, Clanton, Alabama to Jemison, Alabama; and (6) the modification of the reference coordinates for Station WAYI(FM), Channel 249A, Thomaston, Alabama. Further, to prevent the removal of the sole local aural service at Homewood, Cox proposed to reallocate and change the community of license of its Station WBPT(FM), Channel 295C, Birmingham, Alabama, to Homewood. This counterproposal was mutually exclusive with the *NPRM*'s proposal because Channel 262A at Dadeville was short-spaced to proposed Channel 263A at Auburn.

5. Third, International Systems Corp. ("ISC") counter proposed the allotment of Channel 262A at Camp Hill, Alabama, as a first local aural service. The proposed allotment of Channel 262A at Camp Hill was also mutually exclusive with the allotment of Channel 263A at Auburn.

6. The *R&O* dismissed the four proposals filed in this proceeding for various reasons and made no allotments. First, with respect to the proposed allotment of Channel 263A at Auburn, the *R&O* granted ANI's motion to withdraw its expression of interest in the Auburn allotment and approved a

⁵ Section 1.420(i) of the Rules permits the modification of an FM station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest, provided that the existing and proposed allotments are mutually exclusive.

⁶ When Cox filed its counterproposal, the call letters for its station on Channel 247A at Homewood were WRLR(FM), and the call letters for its station on Channel 295C at Birmingham were WODL(FM). However, on October 17, 2001, the call letters for the Homewood station were switched from WRLR(FM) to WODL(FM); and the call letters for the Birmingham station were changed to WBPT(FM). Throughout this document, we will refer to these stations with their current call letters.

⁷ Section 1.420(g)(3) provides in pertinent part that the license or construction permit for an FM station may be modified to a mutually exclusive, higher class, adjacent or co-channel in the same community.

settlement agreement between ANI and Cox.⁸ Since no other expressions of interest were filed for Channel 263A at Auburn, no allotment was made. Second, ISC's counterproposal to allot Channel 262A to Camp Hill, Alabama, was dismissed as technically defective due to its inability to provide city-grade coverage to the community.⁹

7. Third, the R&O dismissed the RSI and Cox counterproposals because they were technically defective at the time of their filing due to short-spacings to a deleted channel in an earlier rulemaking proceeding that was not yet final. Specifically, RSI's proposed reallocation of Channel 263C1 from Northport to Helena and Cox's proposed substitution of Channel 262A for Channel 247A at Dadeville were short-spaced to the licensed site for Station WWWQ(FM), Channel 263C, Anniston, Alabama.¹⁰ While Station WWWQ(FM) was granted a reallocation, downgrade, and change of community of license in MM Docket No. 98-112 to move to College Park, Alabama, on Channel 263C3 effective on June 14, 2000, and while a petition for reconsideration in that proceeding had been denied on February 7, 2001,¹¹ the Anniston proceeding was not final on June 18, 2001, when RSI and Cox filed their counterproposals in the Auburn proceeding due to the pendency of a second petition for reconsideration. Even though RSI's proposed reallocation at Helena and Cox's proposed channel substitution at Dadeville cleared Station WWWQ(FM)'s reference coordinates for the reallocation and downgrade at College Park, the R&O reasoned that these counterproposals could not be accepted because it is our policy not to accept rulemaking proposals that are contingent on the licensing of facilities set forth in an outstanding construction permit¹² or are dependent upon final action in another rulemaking proceeding.¹³ The rationale for this approach is that processing contingent proposals is inefficient and unnecessarily burdensome on the staff because "[t]he staff would either have to wait until the contingency is met, thereby further delaying action in a case, or would have to revisit a decision if a proposal was granted contingent on the outcome of an action that never occurred."¹⁴ Since counterproposals are required to be technically correct and substantially complete "at the time they are filed,"¹⁵ the R&O concluded that the

⁸ Under this agreement, ANI withdrew its expression of interest in the Auburn allotment in return for reimbursement by Cox of ANI's legitimate and prudent expenses incurred in this proceeding in compliance 1.420(j) of the Commission's Rules.

⁹ ANI and ISC did not file petitions for reconsideration of the dismissals of their counterproposals. Consequently, those dismissals are now final.

¹⁰ The actual spacing between Channel 263C1 at Helena and Channel 263C at Anniston is 139 kilometers whereas the required spacing under Section 73.207 of the Rules is 270 kilometers. Likewise, the actual spacing between Channel 262A at Dadeville and Channel 263C at Anniston is 82.8 kilometers while the required spacing is 165 kilometers.

¹¹ *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, 15 FCC Rcd 9971 (M.M. Bur. 2000), *recon. denied*, 16 FCC Rcd 3411 (M.M. Bur. 2001).

¹² *Auburn, AL*, 17 FCC Rcd at 16229, *citing* *Cut and Shoot, TX*, 11 FCC Rcd at 16383 (M.M. Bur. 1996) (dismissal of a rulemaking petition that was fully spaced to an outstanding construction permit of another station but was short-spaced to the licensed site of the station affirmed because the proposal was required to clear all existing authorizations under Section 73.208(a) and was contingent on the building and licensing of the facilities set forth in the construction permit).

¹³ *Id.*, *citing* *Esperanza, Puerto Rico, and Christiansted, Virgin Islands*, 11 FCC Rcd 2908 (M.M. Bur. 1996) (dismissal of a rulemaking petition affirmed because the request relied on an effective but not final rulemaking action due to the pendency of a petition for reconsideration against the latter rulemaking action); *Oxford and New Albany, MS*, 3 FCC Rcd 615, 617 n.3 (M.M. Bur. 1988), *recon.*, 3 FCC Rcd 6626 (M.M. Bur. 1988); and *Fredriksted, Virgin Islands and Olebraland Carolina, Puerto Rico*, 10 FCC Rcd 13627 (M.M. Bur. 1995).

¹⁴ *Auburn, AL*, 17 FCC Rcd at 16229.

¹⁵ See, e.g., *Broken Arrow and Bixby, Oklahoma, et al.*, 3 FCC Rcd 6507 (M.M. Bur. 1988), *recon. denied*, 4 FCC Rcd 6981 (M.M. Bur. 1989); *Fort Bragg, California*, 6 FCC Rcd 5817 (M.M. Bur. 1991).

Cox and RSI counterproposals must be dismissed. Further, the *R&O* noted that even though a second petition for reconsideration in MM Docket No. 98-112 had been subsequently denied by the Commission¹⁶ and a third petition for reconsideration in MM Docket No. 98-112 had been recently denied by the Commission,¹⁷ a fourth petition for reconsideration and second motion to reopen the record in MM Docket No. 98-112 were filed on August 19, 2002. As a result, the *R&O* concluded that Cox's and RSI's counterproposals continued to violate our policy on accepting contingent proposals on the dates that the Auburn *R&O* were both adopted and released.

PETITION FOR RECONSIDERATION

8. Joint Petitioners contend that the staff erred as a matter of law in dismissing the RSI and Cox counterproposals because they were short-spaced to a deleted but non-final allotment at Anniston, Alabama. They allege that this result is inconsistent with precedent in four respects and, therefore, request that the counterproposals be granted and, if necessary for consistent application of Commission policy and precedent, conditioned on the finality of the Anniston/College Park proceeding.

9. In support of this position, the Joint Petitioners first argue that the *R&O*'s conclusion that the Cox and RSI counterproposals were required to protect the deleted Anniston allotment is inconsistent with the staff's prior actions in the Auburn proceeding. They note that on November 20, 2000, the staff dismissed ANI's initial rulemaking petition to allot Channel 263A at Auburn because it was short-spaced to the deleted Anniston allotment and, therefore, contingent on finality in MM Docket 98-112. However, the Joint Petitioners point out that on April 27, 2001, the staff accepted ANI's updated rulemaking petition¹⁸ to allot Channel 263A at Auburn and released the *NPRM* in this proceeding even though the proposed allotment at Auburn was still short-spaced to the deleted Anniston allotment that was not final due to the pendency of a second petition for reconsideration in MM Docket No. 98-112. Likewise, they note that on October 23, 2001, the staff issued a Public Notice accepting Cox's and RSI's counterproposals, which was consistent with its treatment of ANI's updated rulemaking petition. However, the Joint Petitioners argue that on August 30, 2002, the staff followed a conflicting policy, dismissing the Cox and RSI counterproposals because they were contingent on the outcome of a non-final docket.

10. Second, the Joint Petitioners allege that the *R&O* misapplied the *Cut and Shoot, Texas*, case.¹⁹ In that case, a rulemaking petition for a new FM allotment at Cut and Shoot was short-spaced to another station's licensed facilities but fully spaced to the unbuilt facilities specified in the station's construction permit. The Joint Petitioners claim that the rulemaking petition for the Cut and Shoot allotment was returned because it was contingent on a third party constructing the facilities in the construction permit and that the policy behind the holding is to prevent the filing of applications that are contingent upon the future construction and licensing of another station that might never be built. However, the Joint Petitioners contend that it does not serve the public interest to apply the *Cut and Shoot* policy to the facts presented by Cox's and RSI's counterproposals because the facilities set forth in Station WWWQ(FM)'s College Park construction permit were constructed and on the air more than six

¹⁶ See *Anniston and Ashland, AL, et al.*, 16 FCC Rcd 19857 (2001).

¹⁷ See *Anniston and Ashland, AL et al.*, 17 FCC Rcd 14830 (2002).

¹⁸ On February 7, 2001, ANI filed an updated petition for rulemaking to allot Channel 263A at Auburn. This rulemaking petition was returned on April 4, 2001, by a second staff letter because it failed to protect the application filed by Station WWWQ(FM), College Park, to upgrade its facilities from Channel 263C3 to Channel 263C2. Thereafter, on April 6, 2001, ANI filed a supplement to its updated petition, noting that Station WWWQ(FM) had amended its upgrade application to specify a different tower site that cleared the reference coordinates specified by ANI in its rulemaking petition to allot Channel 263A at Auburn.

¹⁹ See *supra* note 12.

months before the counterproposals were filed. Further, the Joint Petitioners argue that, by relying on the *Cut and Shoot* decision, the staff did not take into account the unusual circumstances presented here in which "[t]he filing of four petitions for reconsideration by Preston Small in the Anniston/College Park Proceeding constitutes a very unique abuse of FCC processes."²⁰ They believe that even if the staff should decide that *Cut and Shoot* is applicable, it should create a narrow exception to the policy "... in recognition of the unusual, special facts of this case where, but for an abuse of process in another rulemaking proceeding, Cox's and Radio South's counterproposals faced no obstacles to grant."²¹

11. Third, the Joint Petitioners contend that the R&O erroneously relied upon the cases of *Esperanza, Puerto Rico, Christiansted, Virgin Islands; Oxford and New Albany, MS, and Frederiksted, Virgin Islands and Culebra and Carolina, Puerto Rico*²² to support the dismissal of the RSI and Cox counterproposals. Although the Joint Petitioners acknowledge that rulemaking proposals in those cases were dismissed because they were contingent on channel changes in earlier proceedings that were not final, they state that those cases "... were decided at time when the filing of a petition for reconsideration stayed the effect of a channel change order."²³ By way of contrast, the deletion of the Anniston allotment was effective on June 14, 2000 despite Small's filing four petitions for reconsideration because the Commission had repealed its automatic stay rule. As a result, the Joint Petitioners contend that the three cited cases should not be applied to the instant situation where Station WWWQ(FM) has actually constructed and commenced operations at College Park subject to the outcome of the Anniston proceeding.

12. Fourth, the Joint Petitioners allege that the RSI and Cox counterproposals were treated differently than other similarly situated applicants or rulemaking petitioners whose proposals were granted or held in abeyance pending finality in MM Docket 98-112. Specifically, the Joint Petitioners point out that on November 14, 2000, Station WWWQ(FM)'s application to implement its reallocation and downgrade at College Park was granted subject to the outcome of MM Docket 98-112 even though it did not protect the deleted Anniston allotment.²⁴ Likewise, the Joint Petitioners state that an application filed by Station WLXY(FM), North Port, Alabama, to modify its facilities was also conditionally granted despite a short-spacing to the deleted Anniston allotment.²⁵ Further, the Joint Petitioners note that on May 17, 2002, a *Notice of Proposed Rule Making* was released, proposing to reallocate, downgrade, and change the community of license of Station WLAY(FM) from Channel 262C1, Tuscumbia, Alabama, to Channel 262C2, Meridianville, Alabama, even though Channel 262C2 at Meridianville is short-spaced to the deleted Anniston allotment.²⁶ Since applications and rulemaking petitions are subject to the same distance separation requirements, the Joint Petitioners argue that this disparate treatment is not warranted and violates the mandate of *Melody Music, Inc. v. FCC*.²⁷

RESPONSIVE PLEADINGS

13. In his opposition, Small seeks to raise three issues. First, noting that RSI in this

²⁰ RSI and Cox Petition for Reconsideration in MM Docket 01-104 at 9-10.

²¹ *Id.* at 10.

²² See *supra* note 13.

²³ RSI and Cox Petition for Reconsideration in MM Docket 01-104 at 11, citing *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501 (1996).

²⁴ See File No. BPH-20000714AAV.

²⁵ See File No. BPH-19991012AAAG.

²⁶ *Meridianville, Tuscumbia, Carrollton, and Gunley, Alabama*, 17 FCC Rcd 8890 (Med. Bur. 2002).

²⁷ 345 F.2d 730 (D.C. Cir. 1965).

proceeding and WNNX License Investment Co., licensee of Station WWWQ(FM), College Park, Alabama, in MM Docket 98-112, are represented by the same counsel, Small contends that the reconsideration petition in this proceeding characterizes Small's fourth reconsideration petition in MM Docket 98-112 as an abuse of the Commission's processes. Small claims that these references constitute a violation of the Commission's *ex parte* rules because the reconsideration petition in MM Docket 01-104 was not served on Small. In support of this position, Small states that "[a] prohibited *ex parte* presentation is a communication made to decision making Commission personnel which is directed to the 'merits or outcome of a proceeding,' but which is not served upon parties to the proceeding."²⁸ Small believes that these references are directed to the merits of the Anniston proceeding and are, therefore, not permitted in a restricted notice and comment rulemaking proceeding such as MM Docket 01-104. Further, Small argues that none of his reconsideration petitions in MM Docket 98-112 has been found by the Commission to be abusive and that multiple reconsideration petitions are warranted in proceedings such as Docket 98-112 to contest the most recently released Commission order.

14. Second, Small alleges that there is no good cause to create an exception to the *Cut and Shoot* policy due to the alleged abuse of process in MM Docket 98-112 because there have been no Commission findings of abuse in that docket and because counsel for Station WWWQ(FM) and RSI are not authorized to make such determinations. Third, Small claims that there is some undisclosed relationship between Cox, RSI, and Station WWWQ(FM), College Park, Alabama. In support of this position, Small alleges that pursuant to an asset purchase agreement, Station WWWQ(FM) will avoid a \$10 to \$20 million payment to the prior owner of Station WWWQ(FM) if finality does not occur in MM Docket 98-112 prior to May, 2003.²⁹ Under these circumstances, Small questions why Station WWWQ(FM) would want to pay an additional \$10 - \$20 million so that RSI can proceed with its counterproposal in MM Docket 01-104 and whether these companies are engaged in some activity which is prohibited by the Commission's rules.

15. Fourth, Small alleges that the reconsideration petition in MM Docket 98-112 contains disqualifying misrepresentations to the Commission regarding RSI's detrimental reliance upon staff actions taken in MM Docket 01-104. Small bases this contention upon two alleged inconsistent statements. First, Small cites the following passage from the reconsideration petition in MM Docket 01-104, in which the Joint Petitioners state that:

The Division's acceptance of ANI's Updated Petition, Cox's counter-proposal, and Radio South's counterproposal coupled with its subsequent sudden change in course has substantially harmed Cox and Radio South. On April 27, 2001, the Division accepted ANI's Updated Petition and on October 23, 2001 accepted Cox's and Radio South's counterproposals as technically correct. Cox and the affected parties relied on the Division's actions and expended substantial amounts of time and money on preparation and submission of further pleadings in the proceedings. Regulated parties should be allowed to rely on a government agency's actions and are entitled to assume that the staff decisions are consistent and evenly applied.³⁰

Small contends that this statement is a misrepresentation because it is inconsistent with the following statement made by RSI in a comment in MM Docket 98-112. In that pleading, RSI stated:

²⁸ Small's Opposition in MM Docket 01-104 at 2, citing 47 C.F.R. § 1.1202(a),(b), and (c).

²⁹ *Id.* at 9-10, citing FCC File BALH-961118GM, Asset Purchase Agreement, § 2.4, at 5.

³⁰ *Id.* at 11, citing RSI and Cox Reconsideration Petition in MM Docket 01-104 at 8.

There is pending before the Commission an application filed by RSI on October 12, 1999, and amended on May 3, 2000, which proposes to specify operation of WLXY on Channel 263C1 at Northport, Alabama (File No. BPH-19991012AAG), pursuant to the Commission's one-step upgrade process However, as a result of the filing of the [Mr. Small's] Petition for Reconsideration, the Report and Order [DA 00-322 released in MM Docket 98-112] has not become final and the staff of the Mass Media Bureau will not process RSI's application until the reconsideration petition is acted upon.³¹

Small alleges that the statements are inconsistent and attempt to mislead the Commission because, in the former, RSI appears surprised that the staff returned the Cox and RSI counterproposals because of the lack of finality in MM Docket 98-112 but, in the latter, acknowledges that the proposed improvements to its Northport station must await finality in MM Docket 98-112. Because the first statement was made in an effort to improve RSI's Stations WLXY(FM), Northport, and WTUG(FM), Tuscaloosa, Small contends that the Commission should commence a hearing to determine whether RSI has the requisite character qualifications to continue as the licensee of those stations.

16. In their reply, the Joint Petitioners contend that Small's argument about an *ex parte* violation is repetitive, irrelevant, and erroneous. They believe that the argument is repetitive because it has been advanced in both MM Docket 98-112 and in a letter to the FCC's General Counsel. They assert that the *ex parte* issue is irrelevant because Small does not state a claim for any relief that can be granted as a result of the alleged violation. Further, referring to a consolidated opposition filed in MM Docket 98-112, the Joint Petitioners allege that the *ex parte* argument is erroneous because Small mistakes and misapplies the law.

17. The Joint Petitioners next argue that Small's position that no exception should be made to the *Cut and Shoot* policy in this case is irrelevant because, unlike the facts in *Cut and Shoot*, the RSI and Cox counterproposals are not contingent upon the construction of facilities by a third party. In this case, Station WWWQ(FM), College Park, has already completed construction. Further, the Joint Petitioners contend that Small's allegations about an undisclosed, improper relationship between one or more of Cox, RSI, and Station WWWQ(FM) is speculative. On the contrary, all three of these parties state that they have no pre-existing contractual relationship between them. Finally, with respect to the alleged misrepresentation, the Joint Petitioners contend that the cited passages are consistent with one another because they request that the Commission treat similarly situated parties in a similar fashion.

18. Small also filed a reply to his own opposition in MM Docket 01-104, rearguing the merits of the previously raised *ex parte* issue and addressing some of the reasons given in the consolidated opposition in MM Docket 98-112 by Station WWWQ(FM) as to why it does not believe that an *ex parte* violation occurred. For example, Small disagrees with Station WWWQ(FM)'s argument that no *ex parte* violation occurred because the statements made in Docket 01-104 were filed with the Secretary of the Commission and not with a decision-maker itself. Small contends that this argument is wrong because the document was not intended for review by the Commission's Secretary but was directed to decision makers. Regarding the misrepresentation issue, Small again questions whether the Joint Petitioners' claims of detrimental reliance in MM Docket 01-104 were made in good faith after being advised by the

³¹ *Id.* at 12, citing RSI's August 16, 2000 Comments on Petition for Reconsideration at 1-2. We also take official notice of Station WNXX(FM)'s consolidated opposition of November 8, 2002, directed against Small's fourth petition for reconsideration in MM Docket 98-112. Therein, Station WNXX(FM) argues, *inter alia*, that the RSI and Cox reconsideration petition in MM Docket 01-104 is not an *ex parte* presentation because the *ex parte* rules do not prohibit a party's ability to freely participate in other proceedings. It contends that RSI had to file its petition reconsideration petition in MM Docket 01-104 or lose its rights, and in so doing, had to discuss MM Docket 98-112 because that proceeding was the reason that its counterproposal was dismissed.

staff that RSI's one-step upgrade application for Station WLXY(FM), Northport, would face delay because of the lack of finality in MM Docket 98-112.

19. On December 16, 2002, the Joint Petitioners submitted a letter, stating that they will rest on their pleadings already filed in this proceeding. The Joint Petitioners also reaffirm that they are willing to accept a grant of their counterproposals conditioned on the outcome of the Anniston/College Park proceeding and to bear that risk and proceed with the expenses involved in implementing the grant of the counterproposals.

20. Thereafter, Small filed a response to the Joint Petitioners' letter, objecting to any solution of MM Docket 01-104 that would allow the Joint Petitioners to construct the facilities set forth in their counterproposals until finality has occurred in the Anniston/College Park proceeding. Small asserts that permitting the Joint Petitioners to proceed with construction on their counterproposals may cause difficulties should he eventually prevail in the Anniston proceeding.

DISCUSSION

21. After a careful review of the record in this proceeding, we will grant the Joint Petitioners' reconsideration petition, reinstate, and grant the RSI and Cox counterproposals subject to the outcome of MM Docket 98-112. As a result, RSI and Cox may file construction permit applications to implement their counterproposals. Based on the circumstances in this case, construction permits issued to implement this order shall include a condition prohibiting construction until finality has occurred in MM Docket 98-112.

Treatment of Non-final Rulemaking Actions

22. Generally, we have dismissed rulemaking proposals to amend the FM Table of Allotments that rely on effective but non-final actions in other rulemaking proceedings. We abandon this policy for several reasons. We agree with Joint Petitioners that *Cut and Shoot* is not applicable and that our reliance on this precedent in the R&O was error. Moreover, the former policy is inconsistent with the Commission decision to eliminate the former rule provision that provided that the filing of a petition for reconsideration would automatically stay the effectiveness of a channel change order.³²

23. This approach is consistent with *Chester, Shasta Lake City, CA et al.*,³³ in which the Commission affirmed the grant of an allotment even though a petition for reconsideration was pending in a separate, interrelated proceeding. The Commission rejected an argument that the allotment prejudiced an appeal in the interrelated proceeding and stated:

We disagree. The Commission's rules no longer prohibit the grant and construction of authorized facilities pending final resolution of a related, outstanding rulemaking proceeding. See *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501 (1996) (deleting rule that automatically stayed allotment proceedings upon the filing of a petition for reconsideration). See, e.g., *Cloverdale, Montgomery, and Warrior, AL*, 12 FCC Rcd 2090 (M.M. Bur.1997) (since lifting the automatic stay provision, the Commission routinely grants applications notwithstanding petitions pending in related proceedings).

³² See *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501 (1996).

³³ 16 FCC Rcd 4009 (2000).

24. We further believe that accepting rulemaking proposals that rely upon actions in earlier rulemaking proceedings that are effective but not final will benefit the public. Broadcasters will be able to pursue changes to the FM Table of Allotments that could result in new or improved service to the public earlier than they presently can. However, we caution parties that any contingent rulemaking proposals would be granted subject to the outcome of earlier allotment proceedings that are effective but not final.³⁴ Based on the complexity and scope of MM Docket No. 98-112, we will not permit the Joint Petitioners to construct facilities made possible by the actions taken in that related proceeding until it becomes final. Moreover, the staff retains the authority to stay the effectiveness of allocations orders for good cause.

Ex Parte Issue

25. We find that, although the Joint Petitioner's petition for reconsideration in this proceeding incidentally touched on the merits of the restricted Anniston proceeding, no violation of the *ex parte* rules occurred. As the Commission has said: "... interested persons [as to a particular proceeding] are entitled to pursue other legitimate interests before the Commission, but must not use the pendency of other matters as a pretext for *ex parte* communications going to the merits or outcome of a restricted proceeding."³⁵ We agree with the Joint Petitioners that the statements made by the parties in the Auburn petition did not constitute a "pretext" for reaching the merits of the restricted Anniston proceeding. Rather, they were, directed to the merits of the Auburn proceeding, *i.e.*, whether the staff should dismiss the Auburn counterproposals. To the extent that the parties characterized Small's petition as "abusive" or "meritless," this is without prejudice to Small. Small had a full opportunity to respond to those arguments in that context to the decision-makers directly involved in the Anniston proceeding.

Misrepresentation and Undisclosed Relationships

26. We believe that no substantial or material question of fact has been raised regarding misrepresentations or undisclosed relationships. With respect to the former, we agree with the Joint Petitioners that the two referenced passages do not indicate an attempt to mislead the Commission regarding their detrimental reliance on the staff's acceptance of ANI's updated rulemaking petition and their own counterproposals. On the contrary, we find that the statements are consistent because the Joint Petitioners are asking that their counterproposals be reinstated and granted in MM Docket 01-104 subject to the outcome of MM Docket 98-112 and treated like the one-step upgrade application of Station WLXY(FM), Northport, which was not dismissed as contingent. Small has not presented any extrinsic evidence to support its claim of undisclosed relationships, and we note that the Joint Petitioners and Station WWWQ(FM) have denied that any pre-existing contractual relationship exists between them.

RSI's Counterproposal

27. We will conditionally reallocate and change the community of license of RSI's Stations WLXY(FM), Channel 263C1, from Northport to Helena and Station WTUG(FM), Channel 225C1 from Tuscaloosa to Northport because these changes will result in a preferential arrangement of allotments under our FM Allotment priorities.³⁶ Specifically, the reallocation and change of community of license of

³⁴ See *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rod at 9506. Therein, the Commission stated that "[w]e emphasize, of course, that parties electing to proceed before the allotment decision is final do so at their own risk and must bear the costs of any subsequent action reversing or revising the allotment decision."

³⁵ *Rules Governing Ex Parte Communications*, 1 FCC 2d 49, 58 ¶ 25 (1965).

³⁶ The FM allotment priorities are (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Coequal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

Station WLXY(FM) to Helena would result in a first local service to Helena (population 10,295), triggering priority (3). Likewise, the reallocation and change of community of license of Station WTUG(FM) from Tuscaloosa (population 77,906) to Northport (population 19,435) will preserve a first local service in Northport since there are no other operating radio stations licensed to Northport. By way of contrast, retention of Station WTUG(FM) at Tuscaloosa would invoke priority (4), other public interest matters, because it would be a ninth local service at that community.³⁷

28. Our grant of RSI's counterproposal is made subject to two conditions. First, to ensure that local aural service is retained at Northport, we will require, as we have in past cases, that Station WLXY(FM) may not commence operating at Helena until Station WTUG(FM) commences operations at Northport. Second, as discussed above, construction of the facilities for these two changes of community proposals may not be commenced until finality has occurred in MM Docket 98-112.

29. We recognize that the reallocation and change of community of license of Station WLXY(FM) from Northport to Helena constitutes a move from a community located within the Tuscaloosa Urbanized Area to another community located within the Birmingham, Alabama, Urbanized Area, requiring a *Huntington/Tuck* showing that Helena is sufficiently independent of the Birmingham Urbanized Area to warrant a first local service preference. We have analyzed RSI's showing and find that it supports such a conclusion.³⁸ With respect to the first of the three factors – the extent to which the proposed station will provide service to the entire Urbanized Area – Helena satisfies this requirement because the 70-dBμ signal of Station WLXY(FM) will cover only 31.7% of the Birmingham Urbanized Area. While the second factor – the size and proximity of the suburban community to the central city of the Urbanized Area – reveals that Helena's population represents only 4.4% of Birmingham's population, we note that the first two factors have less significance than the third factor – the interdependence or independence of the suburban community to the central city of the urbanized area.³⁹ This third factor in turn involves examining eight sub-factors.⁴⁰ Our analysis of these eight sub-factors reveals that a majority justify a finding of independence.⁴¹ Most notably, Helena is an incorporated community with its own local government, an independent police force, fire department, and planning commission with its own water and sewerage facilities. The city has many commercial establishments and health facilities and does not rely upon Birmingham for any of its utilities, public services, schools, or libraries.⁴²

30. Although the reallocation of Channel 263C1 from Northport to Helena will result in a gain

³⁷ There is also a rulemaking proceeding pending, MB Docket 03-77, to downgrade and reallocate Station WDBF(FM), Channel 263C1, from Tuscaloosa to Midfield, Alabama.

³⁸ See *Haye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

³⁹ See, e.g., *Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10352, 10355 (M.M. Bur. 1995).

⁴⁰ The eight factors are (1) the extent to which the community residents work in the larger metropolitan area rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the community and central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services, such as police, fire protection, schools, and libraries.

⁴¹ Specifically, we find that factors 2, 3, 4, 5, 6, and 8 are present.

⁴² As an incorporated community, Helena also qualifies as a community for allotment purposes. See, e.g., *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 101 (1982); and *Cleveland and Ebenezer, MS*, 10 FCC Rcd 8807 (M.M. Bur. 1995). This conclusion is further buttressed by the indicia of community status discussed above in connection with the *Huntington/Tuck* showing.

of service to 760,691 persons in an area of 12,604 square kilometers, there will be a loss of service to 5,421 persons in an area of 485.7 square kilometers.⁴³ However, this loss area is well served by more than five existing aural services.⁴⁴ Further, with respect to the reallocation and change of community of license for Station WTUG-FM from Tuscaloosa to Northport, we note that Station WTUG-FM currently has a license issued pursuant to Section 73.215 of the Commission's Rules and is providing contour protection to Station WBLX-FM, Channel 225C, Mobile, Alabama, to address a 0.6 kilometer short-spacing. Station WTUG-FM also has a grandfathered short-spacing of two kilometers to Station WJBB-FM, Channel 224A, Haleyville, Alabama, as the result of changes in the minimum distance separation requirements for Class A stations when the maximum effective radiated power for this class of station was increased from 3 to 6 kilowatts in 1989. Since rulemaking proponents are not permitted to use the provisions of Section 73.215 of the Commission's Rules at the allotment stage, Station WTUG-FM is proposing to change its site by 0.16 kilometers (0.1 mile), which will eliminate the short-spacing to the Mobile station and, at the same time, maintain the two kilometer grandfather short-spacing to the Haley station.⁴⁵ Although we generally have permitted grandfathered stations to change their community of license without changing their transmitter sites,⁴⁶ we have in at least one case permitted a grandfathered station to change both its site and community of license because this would, *inter alia*, not increase interference to listeners and would ameliorate or reduce short-spacings.⁴⁷ We believe that the instant situation falls within that precedent and find that it is in the public interest to approve this site change because the site change is insignificant and will have a negligible effect on interference. Also, as previously mentioned, one short-spacing is eliminated and the other grandfathered short spacing is maintained.

Cox's Counterproposal

31. We will also conditionally grant Cox's inter-related set of allotments because they constitute a preferential arrangement of allotments. Specifically, as detailed below, the counterproposal contains reallocations and changes of community of license by four stations that will result in first local services to the communities of Gardendale, Goodwater, and Jemison, Alabama, will maintain a first local service at Homewood, Alabama, and will provide a net gain in service to 221,595 persons within an area of 6,030 square kilometers.

32. First, we will upgrade Cox's Station WODL(FM), Channel 247A, Homewood, Alabama, to Channel 247C2, reallocate the upgraded channel to Gardendale, Alabama, and modify Station WODL(FM)'s license to specify operation at Gardendale.⁴⁸ This reallocation and change of community of license constitutes a first local service to Gardendale (population 11,626), triggering priority (3). To prevent the removal of the sole local service at Homewood, we will reallocate and change the community of license of Cox's Station WBPT(FM), Channel 295C, from Birmingham to Homewood. As an additional public interest benefit, the upgrade and reallocation of Channel 247C2 to Homewood will result in a gain of service to 215,600 persons in an area of 6,030 square kilometers and no losses of service.

⁴³ The reference coordinates for Channel 263C1 at Helena are 33-07-07 and 87-15-18.

⁴⁴ See, e.g., *LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995).

⁴⁵ The reference coordinates for Channel 225C1 at Northport are 33-03-20 and 87-32-59.

⁴⁶ See, e.g., *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (M.M. Bur 1992); *Oceanside and Encinitas, California*, 14 FCC Rcd 15302 (M.M. Bur. 1999); and *Kankakee and Park Forest, Illinois*, 16 FCC Rcd 6768 (M.M. Bur. 2001).

⁴⁷ *Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876 (Med. Bur., 2001), application for review pending on other grounds.

⁴⁸ The reference coordinates for Channel 247C2 at Gardendale are 33-34-55 and 86-56-46.

33. Gardendale clearly qualifies as a community for allotment purposes because it is incorporated, listed in the U.S. Census, and has numerous indicia of community status such as its own local government, police force, voluntary fire department, schools, Chamber of Commerce, numerous local businesses, and health clinics. Since both Homewood and Gardendale are communities located within the Birmingham, Alabama, Urbanized Area, the reallocation does not require a *Huntington/Tuck* showing in order to be entitled to a first local service preference.⁴⁹ Nevertheless, Cox submitted a *Huntington/Tuck* showing, which in our view supports a finding that Gardendale is sufficiently independent of Birmingham to warrant a first local service, due to the presence of a majority of the eight sub-factors used to determine independence.

34. For the same reasons, the reallocation and change of community of license for Station WBPT(FM) from Birmingham to Homewood does not require a *Huntington/Tuck* analysis because Homewood and Birmingham are both located in the Birmingham Urbanized Area. The reallocation and change of community of license of Station WBPT(FM) will result in the maintenance of a first local service at Homewood, triggering priority (3).⁵⁰ No gain or loss of service will result from this change of community. However, we recognize that a 7.2 kilometer short-spacing currently exists between Station WBPT(FM), Channel 295C, Birmingham, and Station WMLV(FM), Channel 295A, Stonewall, Mississippi. We find that this short-spacing is acceptable because Station WBPT(FM) is not changing its transmitter site for Channel 295C and because the short-spacing is the result of Station WMLV(FM) receiving approval to operate on a short-spaced basis by providing contour protection to Station WBPT(FM) pursuant to Section 73.215 of the Rules. In this regard, we have held that a station should not be precluded from changing its community of license where it is not changing its own site and the short-spacing is the result of another station operating under Section 73.215 of the Rules.⁵¹

35. To accommodate the upgrade, reallocation, and change of community of license for Station WODL(FM) from Homewood to Gardendale, we will make seven other changes to the FM Table of Allotments as requested by Cox. First, we will substitute Channel 262A for Channel 247A at Dadeville, Alabama, at its current site and modify the license for Station WZLM(FM) accordingly, with the consent of the station.⁵² Second, we will substitute Channel 300A for Channel 247A at Orrville, Alabama, at a new site requested by Cox and will modify the license for Station WJAM-FM accordingly.⁵³ Station WJAM-FM has consented to both the channel and site changes. While the change in transmitter site will result in a net loss of service to 1,765 persons, this loss in service is acceptable because the loss area is well served by at least five other full-time stations.⁵⁴ Cox has also agreed to reimburse both the Dadeville and Orrville stations for their reasonable costs in implementing the channel substitutions and the site change.

⁴⁹ See, e.g., *East Los Angeles, et. Al., California* 10 FCC Rcd 2864 (M.M. Bur. 1995).

⁵⁰ Cox did submit a *Huntington/Tuck* showing that in our view also demonstrates that Homewood is sufficiently independent of Birmingham to be credited with a first local service due the presence of a majority of the eight sub-factors on independence.

⁵¹ See, e.g., *Kankakee and Park Forest, Illinois*, 16 FCC Rcd 6768, 6769 (M.M. Bur. 2001); and *Killeen and Ceder Park, Texas*, 13 FCC Rcd 18790 (M.M. Bur. 1998). Although we are reallocating Channel 295C from Birmingham to Homewood, Station WBPT(FM) also has an outstanding construction permit for a downgrade to Channel 295C0. Upon the issuance of a license to cover that downgrade, there will be no short-spacing between Stations WBPT(FM) and WMLV(FM). The reference coordinates for Channel 295C at Homewood are 33-29-19 and 86-45-78.

⁵² The reference coordinates for Channel 262A at Dadeville are 32-52-58 and 85-49-16.

⁵³ The reference coordinates for Channel 300A at Orrville are 32-19-35 and 87-11-57.

⁵⁴ There will be a loss of service to 3,075 persons within an area of 320 square kilometers and a gain in service to 1,310 persons within an area of 320 square kilometers.

36. Third, we will reallocate and change the community of license for Station WSSY-FM, Channel 248A from Talladega, Alabama, to Goodwater, Alabama.⁵⁵ This reallocation and change of community of license will in turn result in a preferential arrangement of allotments because it will provide Goodwater (population 1,633) with a first local service, triggering priority (3). By way of contrast, retention of Station WSSY-FM at Talladega would constitute a third full-time local service, invoking priority (4).

37. Cox has demonstrated that Goodwater qualifies as a community for allotment purposes because it is incorporated with its own local government, planning commission, police and fire departments, water works and sewer board, numerous businesses, and churches. Since Goodwater is not located within any Census-defined Urbanized Area, no *Tuck* showing was required; and Goodwater is, therefore, deserving of a first local aural service.

38. While the change of transmitter site will result in a net loss of service to 27,230 persons, a majority of the entire loss area is well served by at least five other full-time services.⁵⁶ An area of 98.3 square kilometers containing 1,376 persons within the loss area would be reduced from five to four services, and a small area of nine square kilometers containing 67 persons would be reduced from three to two full-time services. Since no "gray" area is being created and because the numbers involved are small, we find that this loss of service is acceptable in view of the overall public interest benefits of this counterproposal.

39. Fourth, to accommodate the reallocation and change of community of Station WSSY-FM to Goodwater, we will modify the reference coordinates for vacant and unapplied for Channel 248A, Pine Level, Alabama. The new site is 10.2 kilometers (6.2 miles) southeast of Goodwater.⁵⁷ Operation from this new site could result in a theoretical gain of 16,980 persons within 560 square kilometers and a theoretical loss of 4,780 persons within 560 square kilometers. All of the theoretical loss area contains service from at least five other full-time services and is considered well served.

40. Fifth, to accommodate the Goodwater reallocation and ultimately the Gardendale reallocation, we will reallocate and change the community of license for Station WEZZ-FM, Channel 249A from Clanton, Alabama, to Jemison, Alabama. This reallocation and change of community of license will also result in a preferential arrangement of allotments because it would provide Jemison (population 2,248) with a first local service, triggering priority (3). In contrast, retention of Station WEZZ-FM at Clanton would be a second local service and a first local night-time service, invoking priority (4), because Clanton already has a day-time only AM station.⁵⁸ The reallocation also would result in a gain of service to 22,300 persons within 790 square kilometers and a loss of service to 6,600 persons within 790 square kilometers, for a net gain of 15,700 persons. The loss area would continue to be well served by at least five other full-time stations.

41. Jemison qualifies as a community for allotment purposes because it is an incorporated town, is listed in the U.S. Census, and contains numerous indicia of community status such as its own local government, social organizations, and local businesses. Further, since Jemison is not located within any Census-defined Urbanized Area and since Station WEZZ-FM's signal would not encompass any portion of an Urbanized Area, no *Huntington/Tuck* analysis is necessary, and Jemison is entitled to be

⁵⁵ The reference coordinates for Channel 248A at Goodwater are 33-02-22 and 86-00-21.

⁵⁶ Specifically, the reallocation to Goodwater would result in a gain of service to 47,730 persons within an area of 2,130 square kilometers and a loss of service to 74,960 persons within 2,130 square kilometers.

⁵⁷ The new reference coordinates for Channel 248A at Pine Level are 31-59-33 and 86-00-05.

⁵⁸ See, e.g., *Geneseo, Illinois, and DeWitt, Iowa*, 12 FCC Rcd 19477 (M.M. Bur. 1997) (preferential arrangement of allotments where a first local service occurs at the new community and the old community would continue to be served by a day-time-only AM station).

credited with a first local service.

42. Station WEZZ-FM has consented to the reallocation and change of community of license. In addition, Cox has pledged to reimburse Station WEZZ-FM for its reasonable costs in implementing this proposal.

43. Sixth, to accommodate the Jemison reallocation, we will also modify the reference coordinates for Station WAYI(FM), Channel 249A, Thomaston, Alabama.⁵⁹ Station WAYI(FM) has consented to the modification of its license to change its transmitter site, and Cox has pledged to reimburse Station WAYI(FM) for its reasonable costs in implementing the transmitter site change. Operation at the new site would result in a gain of service to 10,630 persons within 588 square kilometers and a loss of service to 3,540 persons within 588 square kilometers, for a net gain of 7,090 persons. The loss area would continue to be well served by at least five other full-time stations.

44. As we did with RSI's counterproposal, our grant of Cox's counterproposal is made subject to two conditions. First, to ensure that local aural service is retained at Homewood, we will require, as we have in past cases, that Station WODL(FM) may not commence operating at Gardendale until Station WBPT(FM) commences operations at Homewood. Second, as discussed above, construction of the facilities for all of the allocations involved in the Cox counterproposal may not be commenced until finality has occurred in MM Docket 98-112.

Ordering Clauses

45. Pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective July 7, 2003, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

<u>Communities</u>	<u>Channel Number</u>
Birmingham, Alabama	229C, 233C, 243C, 258C, 284C, 299C
Clanton, Alabama	---
Dadeville, Alabama	262A
Homewood, Alabama	295C
Gardendale, Alabama	247C2
Goodwater, Alabama	248A
Helena, Alabama	263C1
Jemison, Alabama	249A
Northport, Alabama	225C1
Orrville, Alabama	300A
Talladega, Alabama	224A
Tuscaloosa, Alabama	239C1, 288A

46. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the licenses for the stations listed below ARE MODIFIED to specify operation on channels and/or communities listed below, subject to the following conditions:

⁵⁹ The new reference coordinates for Channel 249A at Thomaston are 32-17-45 and 87-44-45.

Station	Community	Channel
WLXY(FM)	Helena, Alabama	263C1
WTUG(FM)	Northport, Alabama	225C1
WODL(FM)	Gardendale, Alabama	247C2
WZLM(FM)	Dadeville, Alabama	262A
WJAM-FM	Orrville, Alabama	300A
WSSY-FM	Goodwater, Alabama	248A
WBPT(FM)	Homewood, Alabama	295C
WEZZ-FM	Jemison, Alabama	249A

- (a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission minor change applications for construction permits (Form 301).
- (b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules
- (d) No construction is to commence for any of the changes approved in this *Order* until finality has occurred in MM Docket 98-112.
- (e) Operating authority for Station WLXY(FM), Channel 263C1 at Helena, Alabama, may not be granted until operations have commenced by Station WTUG(FM), Channel 225C1 at Northport, Alabama.
- (f) Operating authority for Station WODL(FM), Channel 247C2 at Gardendale, Alabama, may not be granted until operations have commenced by Station WBPT(FM), Channel 295C, Homewood, Alabama.

47. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, the licensees of Stations WLXY(FM), Helena, Alabama, WTUG(FM), Northport, Alabama, WODL(FM), Gardendale, Alabama, WBPT(FM), Homewood, Alabama, WSSY-FM, Goodwater, Alabama, and WEZZ-FM, Jemison, Alabama, are required to submit rulemaking fees in addition to the fees required for the applications to effect the change in community of license and upgrade.

48. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Cox Radio, Inc., and Radio South, Inc. IS GRANTED.

49. IT IS FURTHER ORDERED, That the counterproposals filed by Radio South, Inc. and Cox Radio ARE GRANTED subject to the conditions set forth in this *Order*.

50. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

51. For further information concerning this proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

